(10)

V. 22001

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

SECOND APPEAL NO. 485 OF 2005 Single Bench

APPELLANT: [Defendant] Sachchanand Moolchandani, son of Late Jockey Ram Moolchandani, aged about 55 years, resident of Kelkarpara, Raipur.

VS

RESPONDENT: [Plaintiff] Dr. Meghraj K Ramnani, aged about 53 years, son of Shri Khilumal Ramnani, resident of Jawahar Nagar, Mamta Nursing Home, Raipur.

P.R. No. Madhu Moolchandani
Presented by
dated 27/9/05

SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE, 1908

Civil Suit & First appeal valued at

AFR

HIGH COURT OF CHHATTISGARH : BILASPUR

Second Appeal No. 485 of 2005

Appellant/ Defendant : **Sachchanand Moolchandani**

Vs.

Respondent/ Plaintiff : **Dr. Meghraj K Ramnani**

Appellant/defendant by Shri B.P. Sharma, Advocate.

JUDGMENT

(Delivered on 05/01/2006)

Dhirendra Mishra, J

The appellant/defendant has preferred this second appeal under Section 100 of the Code of Civil Procedure (for brevity 'the Code') as he is aggrieved by the impugned judgment and decree passed by learned lower appellate Court and by which the appeal preferred by the appellant against the judgment and decree dated 28.03.2005 passed in civil suit No. 36-B/2002 has been dismissed and the appeal preferred by the respondent/plaintiff against the above judgment and decree has been partly allowed. (Parties hereinafter shall be referred to as per their description before the trial Court.)

2. The plaintiff filed a civil suit for recovery of amount of Rs.25,000/- advanced to the defendant against two promissory notes dated 25.05.1992 for Rs.15,000/- and 26.05.1992 for Rs. 10,000/- and the interest at the rate of 18% per annum against the above amount and other expenses. Thus the plaintiff claimed recovery of a total sum of Rs. of Rs.34,000/- and interest at the rate of 18% per annum from the date of institution of the suit till the re-payment of loan advanced.

3. The defendant denied the averments of the plaint and submitted that he has not taken any loan from the plaintiff and he does not recognize him and in fact as per prevailing practice whenever he required money in business, he obtained the same through broker Amrit Kumar Jaisinghani who provided the required amount after obtaining his signature over the blank promissory note. In the present case also he had contacted said Amrit Kumar for loan who provided Rs.25,000/- after obtaining his signatures on two blank promissory notes. He further submitted that he had returned the said amount to Amrit Kumar, however two promissory notes bearing his signatures had not been returned and the plaintiff had filed the above suit by filling in his name and date fraudulently in the above promissory notes. He further objected that the suit was liable for dismissal for non-joinder of necessary party Amirt Kumar as the promissory notes bear the signature of Amirt Kumar.

4. The trial Court after framing several issues decreed the suit of the plaintiff by recording a finding that the plaintiff is not money lender, the defendant had taken loan of Rs.15,000/- and 10,000/- on 25.05.1992 and 26.05.1992 and had admitted to pay interest at the rate of 18% per annum as the defendant had executed two promissory notes against the said loan and interest accrued on the loan, the suit is not barred by limitation and it is not proved that the defendant obtained Rs.25,000/- from broker Amirt Kumar after putting his signature on two promissory notes. It has been further held by the trial Court that Amirt Kumar is not a necessary party and accordingly the suit was decreed for a sum of Rs.25,000/- with costs. The learned trial Court also directed that the documents in question are bonds and the plaintiff is required to affix stamp duty at the rate of 4% over the above documents.

5. The plaintiff as also the defendant preferred separate civil appeals against the above judgment which are registered as Civil Appeal No.13-B/2005 and 12-B/2005 respectively and the learned lower appellate Court by the impugned judgment and decree dismissed the civil appeal preferred by the appellant/defendant and partly allowed the civil appeal preferred by the

respondent/plaintiff by recording a finding that both the documents of Ex.P/1 and P/2 are promissory notes and not bonds and therefore the finding of the trial Court that the same are bonds, has been set aside and accordingly the direction regarding payment of stamp duty has also been set aside. By the impugned judgment and decree the learned lower appellate Court has also arrived at the conclusion that the defendant is money lender, however, interest against the said loan amount from the date of institution of the suit till re-payment of loan amount, has been refused on the ground that the plaintiff has not complied with the mandatory provisions of Sections 3 and 7 of the Money Lending Act and interest at the rate of 6% per annum over Rs 25,000/- from the date of institution of the suit till the re-payment has been ordered.

6. Learned counsel for the appellant has assailed the impugned judgment and decree on the following grounds;

1. that findings of both the Courts below that the loan was advanced by the plaintiff to the defendants are based on improper appreciation of oral and documentary evidence available on record.
2. that both the Courts below were not justified in drawing adverse inference against the defendant for not examining broker Amirt Kumar as a witness and the above finding has been arrived at by ignoring the common practice prevailing in the business of money lending which is done through brokers.
3. that the documents of Ex.P/1 and P/2 bear the signatures of Amrit Kumar who has also executed a document of Ex.D/1 which mentions that he received a sum of Rs.25,000/- on behalf of Sachchanand from Tirupati Sales Corporation and also stipulates that he shall be returning the promissory notes after receiving the same.

7. The lower appellate Court after examining the documents of Ex.P/1, P/2 and D/1 and after discussing the evidence available on record in detail has arrived at the conclusion that the execution of the promissory notes has been established by the admission of the defendant that he has signed the above documents and therefore, it was the onus of the defendant to

establish that he had repaid the said amount against two promissory notes through broker and he has failed to discharge his onus as he has not examined broker Amirt Kumar in support of his contention. The above finding is based on proper appreciation of evidence on record and the same is concurrent finding of fact recorded by both the Courts below which cannot be interfered at the stage of second appeal.

8. Learned counsel for the appellant has further argued that the documents of Ex.P/1 and P/2 are in fact bonds as defined in Section 2(5) of Indian Stamp Act as it bear the signature of a witness and is not a promissory note. In support of his contention he relies upon the judgment of full Bench of M.P. High Court reported in **AIR 1976 M.P. 144** in the matter of **Santsingh Vs. Madandas Panika and another**.

9. In the aforesaid judgment the definition of bond as given in Section 2(5) and promissory note as given in Section 2(22) of the Indian Stamp Act and further the definition of promissory note under Section 4 of the Negotiable Instrument Act have been reproduced and thereafter it has been held as under;

The essentials of a promissory note are:-

(1) An unconditional undertaking to pay;
(2) The sum should be a sum of money and should be certain;
(3) The payment should be to the order of a person who is certain, or to the bearer of the instrument; and
(4) The maker should sing it. If these four conditions exist, the instrument is a promissory note.

The essentials of a bond are:-

(1) There must be an undertaking to pay;
(2) The sum should be a sum of money but not necessarily certain;

(3) *The payment will be to another person named in the instrument;*

(4) *The maker should sign it;*

(5) *The instrument must be attested by a witness; and*

(6) *It must not be payable to order or bearer.*

On a comparison between the essentials of a promissory note and those of a bond, three distinguishing features have been enumerated as under;

(1) *If money payable under the instrument is not certain, it cannot be a promissory note, although it can be a bond.*

(2) *If the instrument is not attested by a witness, it cannot be a bond, although it may be a promissory note.*

(3) *If the instrument is payable to order or bearer, it cannot be a bond, but it can be promissory note.*

Accordingly, it has been held in the above cited case that the bond must be attested by a witness and it must not be payable to order or bearer.

10. However, in the instant case the documents of Ex.P/1 and P/2 clearly stipulate payment payable to the bearer or order and in the aforesaid circumstances, the same cannot be said to be a bond as the above documents do not have the features of a bond whereas it has all the features of promissory note and simply because it is attested by a witness, it does not become bond and therefore, the learned lower appellate Court has not committed any illegality by recording a finding that the documents in question are promissory notes and not bond.

11. The other question of law proposed by learned counsel for the appellant is 'whether the learned lower appellate Court was justified in recording a finding in the first appeal on a point which was never raised by the appellant in his memo of appeal as per provisions of Order 41 Rule 2 of the Code as admittedly no leave was granted to the parties to address their arguments

regarding the nature of the documents in question?" The above argument by learned counsel for the appellant cannot be sustained in view of the fact that the plaintiff has also preferred civil appeal No. 13-B/2005 and had challenged the findings of the trial Court by which he was directed to pay stamp duty at the rate of 4% and by the impugned common judgment both the appeals have been disposed of.

12. Thus on the basis of aforesaid discussions, no substantial question of law as proposed by learned counsel for the appellant is involved for adjudication of this appeal which requires interference by this Court and accordingly, the appeal fails and is dismissed at the motion stage itself with no costs.

Sd/-
Dhirendra Mishra
Judge
05/01/2006

Khan